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96-8400

No.

Supreme Court, U.S.
FILED
1997
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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SUPREME COURT, U.S.

DOUGLAS MACARTHUR BUCHANAN, JR.
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent,

On Petition for a Writ of Certiorari
United States Court of Appeals
for the Fourth Circuit

APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
April 8, 1997

Gerald T. Zerkin
GERALD T. ZERKIN &
ASSOCIATES
530 E. Main, Suite 800
Richmond, VA 23219
(804) 788-4412

9 pp

TO: THE HONORABLE WILLIAM H. REHNQUIST
CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

Petitioner Douglas MacArthur Buchanan, by counsel, applies to this Court pursuant to 28 U.S.C. § 2251 for a stay of his execution, currently scheduled for April 8, 1997, and states as follows:

1. On December 30, 1996, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's order denial of Buchanan's first petition for a writ of habeas corpus. Buchanan filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on January 27, 1997. The mandate was issued on February 5, 1997. On February 10, 1997, the Circuit Court of the County of Amherst issued an order directing that Buchanan be executed on April 8, 1997. The Order is attached to this Application as Exhibit A.

2. Buchanan seeks an Order from this Court for a stay of execution pursuant to 28 U.S.C. § 2251, which provides:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

3. This Court's power to stay petitioner's execution is clear, and stays of execution have regularly been granted by this Court to death sentenced state prisoners pending a timely resolution of their federal constitutional claims. See, e.g., O'Dell v. Netherland, 117 S.Ct. 631 (1996), Gray v. Netherland, 116 S.Ct. 687 (1995), Grubbs v. Delo, 113 S.Ct. 395 (1992) (Blackmun, J., Circuit Justice).

2. Buchanan asks this Court to stay his presently scheduled execution both to permit him to prepare an adequate petition for writ of certiorari and to afforded the United States Supreme Court the time to consider that petition in a thoughtful manner.

3. A stay of execution is necessary to resolve the serious constitutional issues presented by this case, and this Court should grant a stay of execution in order to permit a timely disposition of this death-sentenced prisoner's federal claims. A stay of execution pending the filing of a petition for certiorari should be granted if, a) it is reasonably probable that four members of the Supreme Court will consider the underlying issue sufficiently meritorious for a grant of certiorari, b) there is a significant possibility that the appellate court's decision will be reversed, and c) irreparable harm is likely to result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Petitioner's case satisfies all of these criteria.

4. Petitioner raises substantial questions of constitutional law. These questions include:

(a) whether, in a non-weighing state, an instruction which merely stated "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment," is adequate to satisfy this Court's Eighth Amendment jurisprudence which compels sentencing juries to consider and give effect to evidence in mitigation, and which requires that juries be carefully guided and instructed in their decisionmaking; and

(b) whether in a state that has identified statutory mitigating circumstances, the Due Process Clause requires that a capital sentencing jury be apprised of their existence as the

factors that the state has deemed particularly relevant to sentencing

(c) whether an interpretation of Green v. Georgia, 442 U.S. 95 (1979), which limits it specifically to its facts, and prevents the hearsay testimony of an expert witness who partly based his opinion on extensive interviews with people who knew the defendant, violates Green, Chambers v. Mississippi, 410 U.S. 284, 302 (1973), and the rule of Montana v. Egelhoff, 116 S.Ct 2013 (1996).

8. Buchanan will be irreparably harmed if he must petition for certiorari and this Court is forced to resolve the compelling issues presented by his case on a truncated or highly expedited schedule.

9. A stay of execution would permit the parties a full opportunity to be heard on the issues raised by Buchanan and to allow for proper review by this Court.

WHEREFORE, for the reasons set forth herein, Buchanan requests that this Court grant a stay of execution.

Dated:

Respectfully submitted,

Gerald T. Zerkin
Gerald T. Zerkin & Associates
530 E. Main Street, Suite 800
Richmond, VA 23219
(804) 788-4412

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY FEB 10 1997

COMMONWEALTH OF VIRGINIA,

v. **Case Nos. 5784, 5947 & 5948**

DOUGLAS MCARTHUR BUCHANAN,

Defendant.

ORDER

This day came the Commonwealth, by its attorney, and the defendant, by counsel, to be heard upon the Commonwealth's Motion to set an execution date pursuant to § 53.1-232.1(iii) of the Code of Virginia. Having determined that the Commonwealth's motion should be granted, it hereby is ORDERED that the death sentence of Douglas McArthur Buchanan be carried out on the 8th day of April, 1997, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before the date of execution, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

APPENDIX
A

Gerald T. Zerkin, Esquire
530 East Main Street, Suite 800
Richmond, Virginia 23219

The Honorable W. Edward Meeks, III
Commonwealth's Attorney for Amherst County
P.O. Box 358
Amherst, Virginia 24521

Katherine P. Baldwin
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 10th day of Feb., 1997.

J. Samuel Johnston, Jr.
Judge

A copy,
Teste: Roy C. Mayo, III, Clerk
ROY C. MAYO, III
Clerk Circuit Court Amherst County, Va.

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 1997, I caused the foregoing Application for a Stay of Execution to be served by hand delivery on Katherine P. Baldwin, Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

Gerald T. Zerkin

type of spontaneous (and therefore reliable) confession from a third party that exculpated the petitioners in Chambers and Green.

The complete lack of any constitutional violation is only underscored by the fact that the ***trial judge repeatedly offered to continue the hearing and to summons the witnesses whose hearsay was being offered.*** (JA 128-129, 137-138, 141). This offer to allow Buchanan essentially the unfettered ability to present any evidence in mitigation also distinguishes this case from Chambers and Green, where the defendants were prevented from presenting crucial evidence. Defense counsel, however, refused all such offers from the trial judge, stating as follows:

> I don't want to do that, Judge. ***We have enough***. I just want to object to your not allowing [the hearsay] in.

(JA 138, emphasis added). Of course, "enough" was an understatement. In addition to the evidence discussed above, the trial court permitted the doctor to rely on his conferences with other doctors involved in the case (JA 141-142), on accepted treatises (JA 130), as well as on "school records or similar type records." (JA 159). Certainly, an evidentiary ruling that Buchanan was given the opportunity to avoid cannot be said to rise to the level of a due process violation of the Constitution.

Significantly, the factual bases for Dr. Brown's opinions were not in dispute. The Commonwealth's experts, Drs. Lee and Gwaltney, relied to some extent on Dr. Brown's evaluation describing Buchanan's upbringing, background and the various tests he had performed, and generally agreed that Buchanan had suffered a deprived and abused childhood. (JA 231, 232-233; Tr. 1510; JA 236, 238). The record, therefore, not only dispels Buchanan's claim of constitutional error, but renders any conceivable error utterly harmless. See Brecht v.

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DOUGLAS McARTHUR BUCHANAN,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, et al.

Respondents.

PETITIONER'S CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on April 3, 1997, I faxed and mailed a copy of this document to Katherine P. Baldwin, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.

Gerald T. Zerkin